

PROPOSAL FOR A DIRECTIVE ON THE PROSPECTUS TO BE PUBLISHED WHEN SECURITIES ARE OFFERED TO THE PUBLIC OR ADMITTED TO TRADING

UNICE COMMENTS

1. GENERAL COMMENTS

UNICE supports the laudable Commission initiative to introduce a single passport for issuers by ensuring that adequate and equivalent disclosure standards are in place in all member States when securities are made available for European investors. This initiative should constitute an important element of the financial services action plan whose final objective is to create an integrated financial services market.

After a thorough assessment of the proposal, UNICE would like to submit the following comments.

Before commenting on the content of the proposal, UNICE would like to stress that this directive together with the directive on market abuse and insider dealing will be the first instruments to be approved on the basis of the new fast-track "procedures" following recommendations in the Lamfalussy report. In this context, UNICE regrets that these proposals, which represent centrepieces of the financial services action plan, in the drive to create an integrated services market by 2003, do not follow the consultation recommendations contained in the above-mentioned Lamfalussy report.

UNICE has noted that the Commission follows the Lamfalussy recommendations in later initiatives such as the transparency obligations of publicly traded companies. UNICE urges the Commission to ensure that this becomes the norm for both principle directives and practical implementation measures, and hopes that the Commission and other institutions will be responsive to UNICE's request for consultation and transparency before publication of any new proposal.

One of the consequences of this lack of formal consultation before publication of the proposed instrument is that the proposed directive raises serious questions for corporate issuers and practitioners in capital markets.

There is no explanation as to the intended impact of this proposal on the regulatory framework. The current proposal introduces ambiguities and could undermine secondary markets. The proposed directive should clearly state guiding principles and objectives at the start. These should include: to facilitate the efficient raising of capital, to attract investors (EU citizens and others) to EU markets, and to ensure that EU markets can compete globally. It is important that the processes that are prescribed in this directive, the links to other directives, and the wording and structure of the directive should be predictable and clear; especially that definitions agreed for this directive should not be the subject of consequential amendment as a result of amendments to other directives. In particular, the definitions

in the Investment Services Directive will be important as to how the Prospectus directive will work in practice.

UNICE regrets that the draft directive treats an issuer's country of incorporation as its "home state" in perpetuity. This will restrict companies' freedom of choice and add to companies' costs. This is more likely to lead to market fragmentation than to integration.

UNICE is of the opinion that the objective of the directive is not fully reached since it puts in place only minimum requirements to which can be added additional national requirements (Articles 5). This might impede efficient functioning of a smooth mutual recognition scheme if too many additional requirements are imposed by national authorities.

UNICE believes that, unless substantial amendments are made to the text of the directive, the result is likely to be a loss of necessary flexibility in regulation to take account of legitimate market practices such as the MTNs (medium term notes) market.

The current proposal would generate added cost for issuers, with a particular impact on SMEs, or on those who issue rarely.

The result might also be that issuers from outside the EU will be deterred from using capital markets within EU Member States with consequent loss of business for the financial services sector.

Lastly, UNICE would like to stress that the issue of where to draw the boundary between framework principles and technical implementing details to be decided by the European Securities Committee should be carefully considered and clarified. UNICE understands the Commission objective of allowing flexibility of definitions and exemptions in order to ensure uniform application and compatibility with developments on financial markets. Nevertheless, UNICE is of the opinion that especially in the case of adaptation of disclosure standards, of deadlines, and clarification the rules concerning the publication of the prospectus, in view of the proposed Regulation on the application of international accounting standards clarification is needed for example on which Committee under the comitology procedure is the appropriate.

2. SPECIFIC COMMENTS

Article 1 - Subject matter and scope

UNICE takes note that the same disclosure requirements are now applicable to both securities which are offered to the public or are admitted to trading on a regulated market contrary to the previous situation. This means that a prospectus with identical contents will have to be published in both cases. Nevertheless, the person who is supposed to draft or to publish the prospectus is not always the same person, depending on the situation:

- In the case of admission to trading on a regulated market, the issuer has to draw up the prospectus.
- This is not the case in the particular situation of resale of traded securities to the public by a shareholder. In this particular situation there is no reason to impose on a shareholder an obligation to provide information that only the issuer company is able to provide. Conversely, there is no reason to force a company to provide a shareholder willing to offer a security to the public, with information necessary for the drafting of the prospectus, whereas this company might not have not published this information.

In the light of the above comments, UNICE suggests that in the particular situation of resale of traded securities to the public by a shareholder, the latter should only be requested to publish information that is publicly disclosed beyond the information related to the offer itself.

Article 2 - Definitions

The definition of offer of securities to the public raises several questions. First of all, UNICE would like to stress the need that definitions in that directive be cross-referenced to the Investment Services Directive.

No distinction is made between offers to the public of securities admitted to trade on a *regulated* market and similar offers on a *non-regulated* market.

This distinction is of essence since when securities are admitted to trading on a regulated market, the respective issuer has to comply with specific requirements to which a permanent information obligation is added. The objective is to enable investors trading the securities to benefit from transparent information conditions via a continuous update of information.

Companies whose securities are traded on a regulated market are already under an obligation to inform the markets of any material news and developments likely to affect their share price under the Admissions Directive. They should not then be obliged to publish additional documentation when such information is already publicly available

In addition, the definitions of article 2 do not make a clear distinction between offer to the public and regular transaction. This could impose publication of a prospectus for any stock-market sales order. In this context, UNICE believes that it is necessary to add to the list of exclusions the following provision:

d) *"Securities which have already been admitted to trading on a regulated market."*

As a consequence, article 1.2.b should be modified by deleting its first words: *"are admitted"*. It is also necessary to modify the definition of offer to the public in the following way:

*'offer of securities to the public' means an offer, invitation or promotional message, in any form, addressed to the public, whose objective is the sale or subscription of securities **not admitted to trading on a regulated market**, including by placing securities through financial intermediaries.*

UNICE is of the opinion that the definition of qualified investors needs to be augmented (to include for example, companies, sophisticated private investors). The present definition is too narrow. Some markets are primarily professional (e.g. Medium Term Notes) but the draft directive fails to recognise this. This could lead to a reduction in the different risk/reward options available to investors through regulated markets. Flexibility is needed.

So that qualified investors are not unwittingly excluded by the directive, some sort of provision could be made for investors to self-select (possibly by application to their competent authority, judged against certain criteria deemed by the competent authority to be appropriate).

Article 3 - Conditions for offer of securities to the public.

UNICE is surprised to see that some of the exemptions contemplated in current legislation have been eliminated without any justification. We would like to see some of these exemptions reinstated as we explain below. On the exemptions proposed in the Directive we also have some comments.

The de-facto prohibition on qualified investors to resell to the public securities for which the prospectus was not published seems to be excessive. UNICE wonders whether a prohibition limited in time could not be envisaged.

At the same time the Directive needs to clarify that the exemptions are also applicable to qualified investors who buy on their own account or on the account of other qualified investors and allow that the exemption is also applicable for resale to other qualified investors.

UNICE does not understand why Article 3.3.e provides an exclusion for securities offered or allotted to existing or former employees only upon condition that it is not in exchange for any form of payment or consideration. UNICE believes that these final words should be deleted

In addition, UNICE is of the opinion that article 3 should not apply to securities issued in a continuous or repeated manner by credit institutions or other financial institutions subject to other special laws and regulations. UNICE therefore suggests addition of the following paragraph to the list of exclusions of article 3.3

(h) Member States may provide for partial or complete exemption from the obligation to publish a prospectus where the transferable securities being offered to the public are: debt securities or other transferable securities equivalent to debt securities issued in a continuous or repeated manner by credit institutions or other financial institutions equivalent to credit institutions which regularly publish their annual accounts and which, within the Community, are set up or governed by a special law or pursuant to such a law, or are subject to public supervision intended to protect savings.

UNICE is of the opinion that the exemption contemplated in article 23.3.a) of the Listing Particulars Directive (where offered shares do not represent more than 10% of the capital of a specific class of shares in a specific market) should also be re-introduced.

Finally, it is also necessary that article 3 contemplates a specific regime for MTN programmes, indicating that when a prospectus for a programme for the issuance of debt securities has been approved by the home Member State's competent authority, another prospectus does not need to be published for the offer to the public or admission to trading of debt securities issued under such programme.

UNICE's attention has been drawn by the fact that Article 3.2.c) contains a minimum denomination exemption where securities are offered to investors only in a denomination of euro 150,000. The minimum denomination exemption under the current Prospectus Directive (89/298/EEC) of 17 April 1989 is euro 40,000. In practice, the minimum denomination exemption is often very important and the minimum denomination of issues may often be dictated by it.

It is proposed to increase the threshold of the availability of the current exemption almost fourfold. Such an increase cannot be justified by reference to inflation and related facts since the existing Prospectus Directive was put in place (1989). UNICE is not sure why it was thought necessary to increase this figure so dramatically in the Proposed Prospectus Directive. Furthermore, the new euro amount, 150,000 is a very awkward figure. UNICE suggests that it would be appropriate to set the figure somewhere around euro 70,000 and in any event, no higher than euro 100,000. The Proposed Prospectus Directive should also clarify that the exemption extends to securities denominated in a currency other than euro where the euro equivalent on the date of issue does not exceed the specified minimum euro denomination.

Article 5 - The prospectus

As indicated in comments under Article 1 above, UNICE suggests that in the particular situation of resale of traded securities to the public by a shareholder, the latter should only be requested to publish information that is publicly disclosed.

As already indicated in the general comments, UNICE takes note that the summary note, in particular (Article 5.4), is a minimum since it should include **at least** the information referred into annex 4. This might run counter to the declared objective of establishing a harmonised set of standards on which mutual recognition would be based.

UNICE disagrees with obliging the issuer to publish a summary document and supports FESCO's recommendation that the summary note should be optional.

UNICE would also like to note that the Directive should clarify the liability of the issuer in relation to the summary beyond the remits of the Directive. The concept of the summary will only work if there is no additional civil liability on the part of the issuer to give full disclosure to the investor (e.g. it has to be read in conjunction with the full disclosure document and may not be relied upon without the full prospectus).

UNICE is concerned about the wide liability imposed on the guarantor. A clear definition of the guarantor is needed.

In relation to the format of the prospectus, UNICE believes that the use of shelf-registration should also be optional, as recommended by FESCO.

In addition, UNICE believes that the wording of Article 5 paragraph 2 should be amended in order to allow the use of electronic means of communication for publication of the prospectus.

Article 6 - Minimum information

UNICE questions the need for the Commission, in addition to the annexes to the Directive, to adopt detailed rules as foreseen by Article 6.1 and 6.4.

There should be provision for short form information for second and third tier markets (such as the Neuer Markt, the Nouveau Marché or AIM) targeted at smaller and high-tech companies. The greater the information requirements, the higher the professional fees and therefore the costs of raising capital. Companies would incur these additional costs regardless of whether they actually wished to market their securities internationally. It would therefore be better to restrict the application of the directive to those companies wishing to market their securities internationally rather than including any securities on a regulated market.

In addition, UNICE believes article 6 should be amended to allow Member States to authorise omission of certain information prescribed by this directive :

-if that information is of minor importance only and is not likely to influence an assessment of the issuer's assets and liabilities, financial position, profits and losses, and prospects;

- or if disclosure of that information would be contrary to the public interest or seriously detrimental to the issuer, provided that, in the latter case, omission would not be likely to mislead the public with regard to facts and circumstances essential for assessment of the transferable securities.

Article 7 – Language and format of the prospectus

UNICE believes that the wording of article 7.1 is too vague and could be used by member States to accept only their national language. UNICE suggests that this article be amended and that a reference be made to acceptance of the usual English language used in this field of activity.

Article 9 - annual updating of the registration document

As already said, shelf-registration should be voluntary. Companies should not have to update their registration documents every year regardless of whether an issue is planned. UNICE notes that FESCO's recommendation was for optional registration. UNICE does not see a reason for the Commission to depart from the results of FESCO's consultation in the absence of further consultation.

This compulsory approach to registration is not appropriate although the precise burden is still unclear because of the comitology procedure.

These proposals would significantly increase disclosure requirements and would adversely impact in particular upon smaller and medium-sized enterprises which may only raise new capital on the occasion of their initial admission to a stock exchange and then never again or not for many years. They would adversely affect the debt market where investors are generally more knowledgeable and require a different level of disclosure. The extra costs involved are also likely to deter non-EU issuers from choosing to list in the EU. In any case, the validity of financial statements should be valid for more than 6 months, for instance 9 months..

In addition UNICE believes it important to make clear that in any case, annual updating of registration documents should cease to apply to securities which are no longer admitted to trading on a regulated market.

Article 11 - Approval and publication of the prospectus

UNICE does not agree with the requirement of Article 12 that the prospectus is made available to the public immediately after approval by the regulator. This means that the issuer has no control over the timing of the publication of the prospectus. Since the time limits of Article 11 only represent a maximum, the Directive should allow some time between approval by the regulator and publication of the prospectus so that the issuer can decide the appropriate time for publication. UNICE would appreciate a clarification as to whether the time limit of 15 days refers to calendar days or working days.

UNICE wonders why the competent authority should require any further information as indicated in Article 11.2. This should only be the case if the document is incomplete and in this context UNICE suggests that the words “*or require any further information*” be deleted, since they are not needed.

Concerning the Choice of Competent Authority, UNICE disagrees with the current proposal to tie the issuer to the regulator of the country of its registered office.

Companies at present have the freedom to choose where they will issue their securities; there is no reason to change this. What is important is to achieve a Single Passport for Pan-European offers is that issuers, once they have obtained the approval of a prospectus for an offer from one competent authority (e.g. in the main country where the public offer will take place, in the country of primary listing), they can use that prospectus, without additional information, in other countries where the same offer will take place. Issuers (EU or otherwise) should be free to apply to the Competent Authority of the Member State of their choice, provided there is a certain connection and should not be restricted to their country of incorporation. Companies should only have to obtain the approval of one Competent Authority where the public offer is to take place and should not be faced with the extra regulatory burden and costs of obtaining approval from the authority of their country of registered office.

The draft directive treats an issuer's country of incorporation as its “home state” in perpetuity. This will restrict companies' freedom of choice and add to companies' costs. This is more likely to lead to market fragmentation than to integration.

The result for non-EU companies who chose initially to issue in one Member State would be that they would then be obliged to make all future issues through this member States, when they might prefer to have the choice of other markets. This could distort decisions about where companies choose to issue initially or to incorporate. Many non-EU companies have multiple finance subsidiaries through which the parent can issue; the current draft would require each issuing subsidiary to file a prospectus with its home state competent authority rather than to make one centralised filing approved by one single competent authority. The result for EU companies will be similarly distorted; companies having parents or subsidiaries in different Member States will need to obtain the approval of two or more authorities, which will not help to achieve the single market. Multi-issuers of MTNs (medium term notes) and indeed the debt market generally will be particularly affected by the requirements for prospectuses to be pre-vetted and approved by each home competent authority.

The issuer should be free to choose as its 'home' the state in which it undertakes the public offer. Thus a UK issuer wanting to raise capital by a public offering in Germany should be able to deal with the German authorities direct and should not additionally need to obtain the approval of the UK authorities.

UNICE believes that the structure and organisation of regulatory institutions should be left to Member States to determine.

Lastly, UNICE would like to point out that prior approval of the prospectus goes against existing practices in some Member States.

Article 13 – Advertising

UNICE believes that the current drafting of Article 13.1 is far too vague and that more details are needed in particular on the exact nature of the check that can be carried out by competent authorities. In addition, UNICE believes that a timetable is necessary for reaction by a competent authority to this communication of information.

UNICE finally believes that article 13.4 on information addressed to qualified investors is completely out of context in an article deemed to regulate the advertising of offers and listings. The proposed Market Abuse Directive already covers the situation of fair disclosure requirements extensively.

Article 15 - mutual recognition

UNICE is of the opinion that the formalities for mutual recognition of prospectuses are still burdensome and are unlikely to add value to the existing arrangements for passporting. The draft prospectus should provide for automatic mutual recognition of the prevailing regulatory practices in Member States. This should involve acceptance of differing obligations for different markets, depending whether primary or secondary, etc..

UNICE supports the notification system insofar as it should merely constitute an exchange of information on the fact that a particular offer/listing has been authorised by a competent authority. Article 15 is not yet designed to satisfy a notification system which will allow an effective functioning of the European Passport. In this respect, UNICE believes that the host authority should not need to "accept" the prospectus and should not be allowed to "refuse" the prospectus already approved by the home authority.

It is important to note that pre-vetting and prior approval of prospectuses and adverts is not obligatory in all member States; in the UK, for example, this is not a requirement and would require an expansion in the capacity of the FSA. This would then entail an increase in costs to finance firms whose fees support the FSA (which costs in the UK already amount to 5–7% of turnover), which will in turn be passed on to companies wishing to issue on the markets and to the consumer.

In any event, authorities placed in the position of approving prospectuses may find themselves liable for misstatements or omissions. Again this could entail additional expense for the authority and thus for the market.

Article 19 - Competent authorities

Article 19.1 foresees that only administrative authorities can be designated as competent to carry out the duties provided for in this Directive. UNICE does not agree with this restriction and believes that any independent and competent authority, regardless of its statute, should be able to do so.

Article 21 – Precautionary measures

UNICE believes that the articulation between respective competences of the host and the home Member State authorities is not very clearly explained and should be looked at further.

Comments on the annexes.

UNICE takes note that several identical pieces of information are required in application of both annexes II and III and particular attention should be paid to deleting identical requirements.

Annex IV looks like a shopping list and should be more structured.

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